

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LAURA FONTES</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 270,342 &
	)	270,343
<b>EXCEL CORPORATION</b>	)	
Self-Insured Respondent	)	

**ORDER**

The self-insured respondent requested review of the January 31, 2003 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on August 5, 2003.

**APPEARANCES**

Chris A. Clements of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

These cases were consolidated and the parties agreed to an August 29, 2001 date of accident. The primary issue raised before the Administrative Law Judge (ALJ) was the nature and extent of claimant's functional impairment. The ALJ discounted the court ordered independent medical examiner's opinion and awarded claimant a 13 percent permanent partial functional impairment to the body as a whole. This percentage was arrived at by splitting the ratings provided by claimant's two medical experts.

The sole issue raised on review by the respondent is the nature and extent of claimant's functional disability. Respondent contends the court ordered independent

medical examiner, Dr. Paul S. Stein, appropriately utilized the *AMA Guides*<sup>1</sup> and his 0 percent impairment rating should be adopted.

Conversely, claimant requests that the ALJ's Award be affirmed. Claimant notes that Drs. C. Reiff Brown and Pedro A. Murati opined that her condition is not addressed in the *AMA Guides* and both doctors determined claimant suffered permanent impairment.

The sole issue for determination by the Board is the nature and extent of claimant's functional impairment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award contains a detailed recitation of the record and it is not necessary to repeat those facts herein. The Board adopts the findings of fact made by the ALJ that are not inconsistent with the findings and conclusions stated in this Order.

It is undisputed claimant suffered injury performing her repetitive work activities for respondent. Claimant began to experience pain in her neck, shoulder and back while performing her job boxing intestines. The job required claimant to place a bag in a box, fill the box with intestines, weigh the box and then pick the box up, turn and place it on a conveyor belt. The boxes weighed 15 pounds and because claimant is approximately five feet tall all of her work activities were essentially performed above her head.

Claimant received treatment from Dr. J. Raymundo Villanueva which consisted of anti-inflammatory and pain medications as well as an injection in her shoulder. When claimant later developed an onset of back symptoms, Dr. Villanueva prescribed anti-inflammatory, pain and muscle relaxant medications as well as physical therapy. On October 18, 2001, the doctor concluded claimant was at maximum medical improvement but continued claimant's medications.

Claimant was referred to Dr. Pedro A. Murati, board certified in rehabilitation and physical medicine and a certified independent medical examiner. This examination, performed December 11, 2001, at the request of claimant's attorney, was to determine treatment recommendations for claimant. Dr. Murati diagnosed myofascial pain syndrome affecting the right shoulder as well as cervical spine and lumbosacral and thoracic strain. Dr. Murati recommended medications, physical therapy, an MRI scan of the right shoulder and lumbar spine as well as an NCT/EMG of the lower back and legs.

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<sup>1</sup> American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant requested a change of treating physician. After conclusion of the April 4, 2002, preliminary hearing held on that request, the ALJ denied the requested change of treating physician. Because it was unclear what, if any, treatment claimant required, the ALJ ordered that Dr. Paul S. Stein conduct an independent medical examination of claimant.

Dr. Stein examined claimant on May 20, 2002. Claimant was two hours late for the appointment because she had difficulty finding the doctor's office. Claimant felt the doctor was angered by her tardiness. Dr. Stein did not recall claimant's tardiness and denied he was angry at claimant.

Upon examination the doctor noted claimant exhibited some tenderness in the interspinous ligaments of her lower cervical and upper to mid thoracic regions as well as her low back. The doctor did not make any other positive findings and concluded claimant's complaints were referable to cumulative trauma disorder affecting the right shoulder and upper back without evidence of nerve root compression or peripheral nerve entrapment. He further noted claimant's lower back discomfort was referred discomfort. Because of an absence of findings the doctor concluded claimant had no permanent impairment. But he did recommend claimant not return to her former job and imposed permanent restrictions against repetitive work activity with the right upper extremity, cervical spine and upper back.

In May 2002, claimant changed jobs and began performing work as a safety monitor. Although claimant continues to have pain in her neck, shoulder and back, it has decreased with her less vigorous physical activity in her new job.

On August 20, 2002, Dr. Murati again examined claimant at the request of her attorney for an opinion concerning the percentage of permanent impairment. Dr. Murati diagnosed myofascial pain syndrome affecting the right shoulder girdle as well as the cervical spine, lumbosacral and thoracic strain. Pursuant to the *AMA Guides*, Dr. Murati rated the claimant's lumbosacral strain at 5 percent, the thoracic strain at 5 percent and the cervical strain 4 percent. The ratings combined for a 14 percent permanent partial whole person impairment.

Dr. Murati imposed permanent work restrictions of no above shoulder work; no lift/carry/push/pull above 20 pounds; occasionally lift/carry/push/pull/ 20 pounds; and, frequently lift/carry/push/pull 10 pounds. Claimant is to avoid work more than 18 inches away from the body and avoid awkward positions of the neck as well as alternate sitting, standing and walking.

Finally, on November 6, 2002, Dr. C. Reiff Brown examined claimant at the request of her attorney. Dr. Brown also reviewed the records of Dr. Villanueva and the reports of Drs. Stein and Murati. Dr. Brown diagnosed claimant with mild rotator cuff tendonitis and myofascial pain syndrome involving the cervical, thoracic and lumbar areas of her spine.

Pursuant to the *AMA Guides*, Dr. Brown rated claimant with a 3 percent impairment to the right upper extremity based upon loss of range of motion of the right shoulder; a 5 percent impairment for her cervical and thoracic spine; and, a 5 percent impairment for her lumbosacral complaints. When converted and combined the ratings result in a 12 percent permanent partial functional impairment to the whole person.

Dr. Brown imposed permanent restrictions to avoid work involving frequent use of the right hand above shoulder level or reaching away from the body more than 18 inches. No lifting above shoulder level with lifting otherwise limited to 30 pounds occasionally, 20 pounds frequently and any lifting done should utilize proper body mechanics.

The claimant limited her request for compensation to her functional impairment because she continues to work for respondent at a comparable wage. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides*, if the impairment is contained therein. At the time of claimant's injury, the Act required that functional impairment be based on the Fourth Edition of the *AMA Guides*.<sup>2</sup> The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>3</sup>

Dr. Stein noted that he felt claimant's complaints of discomfort and pain were genuine but that the *AMA Guides* do not provide a specific impairment for cumulative trauma disorders. Dr. Stein testified:

Q. Doctor, my name is Chris Clements and I represent Laura Fontes in this matter. By offering the opinion that she has a zero percent whole person impairment, you are not testifying or it is not your opinion that she does not have a problem; isn't that fair to say?

A. Yes.

Q. What you are basically saying is, Doctor, this particular person and the problem that she has does not neatly fit within the *AMA Guides*, 4th Edition?

A. That's correct.

Q. If we were to give you some leeway and allowed you to fudge a little bit on the *AMA Guides*, could you offer an opinion concerning her impairment of function?

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<sup>2</sup> K.S.A. 44-510e(a).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

A. It would be very difficult because she has -- she has no problems in terms of range of motion, things like that. I think that -- I guess it depends to some degree on what the definition of impairment is. I think this is a situation where there probably really is no impairment to normal activities, but not to repetitive activities. So if you were to say is there an impairment in terms of doing repetitive activities on a day-to-day basis, I would say, yeah, that impairment is severe. If you are saying is there an impairment based on normal everyday activities, I would say probably not.<sup>4</sup>

Dr. Stein relied on page 19 of the *AMA Guides*, to conclude claimant had no permanent impairment. The doctor noted that a comment on cumulative trauma disorders in the hand and upper extremity section of the Guides indicated that if, with alteration of the work related tasks, the symptoms are reduced the individual should not be considered to be permanently impaired if the physical examination remains normal. The significant factors are no findings upon examination and relief from the symptoms. In this case claimant continued to have symptoms after she left her repetitive work and upon her final examination by Dr. Brown she had reduced range of motion of her shoulder as well as the trigger point findings indicative of myofascial pain syndrome.

Dr. Brown also agreed that the *AMA Guides* did not have a specific category for rating claimant's myofascial pain syndrome. Dr. Brown testified:

Q. Does the *AMA Guides* to the Evaluation of Permanent Impairment actually recognize myofascial pain syndrome as a rateable condition without placing it into another category such as DRE Category II?

A. Well, there is no table or information in the Guides otherwise that would allow you to specifically rate the myofascial pain syndrome as you do carpal tunnel syndrome. It is just simply a spine condition that is best covered in the Category II DRE level.

Q. So in order to provide a rating for that myofascial pain syndrome, because there is no specific table or section of the *AMA Guides* that address that particular condition, you have to analogize it to what you feel would be the next closest medical condition; is that correct?

A. Yes.<sup>5</sup>

The opinion of the physician appointed by the ALJ should be neutral. But this does not always mean the rating is most accurate. In this case, the ALJ noted that all three doctors imposed restrictions and based upon all the evidence concluded the ratings of Drs.

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<sup>4</sup> Stein Depo. at 7-8.

<sup>5</sup> Brown Depo. at 13-14.

Murati and Brown were the most persuasive and appeared to correspond with claimant's complaints and to appropriately evaluate claimant's impairment. The Board agrees and affirms the determination that claimant suffers a 13 percent permanent partial functional impairment to the body as a whole.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 31, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
D. Shane Bangerter, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director